



WORKERS COMPENSATION COMMISSION

E-Bulletin No. 12

December 2003

President's Welcome

Welcome to E-Bulletin No. 12 of the Workers Compensation Commission.

This e-bulletin reproduces in full revised Practice Direction No. 9: Lodgment of Late Documents, effective on and from 10 December 2003.

This direction is intended to assist legal practitioners and parties with lodging:

- late replies
- late responses
- documents produced under directions for production
- late evidence.

Justice Terry Sheahan
President
December 2003

PRACTICE DIRECTION NO. 9

(revised 10 December 2003)

LODGMENT OF LATE DOCUMENTS

PURPOSE

This Direction is intended to assist legal practitioners and parties in relation to the lodgment of late documents, being either late evidence or late reply to an Application to Resolve a Dispute. Self-represented workers who seek more extensive assistance should contact the Workers Compensation Commission ('the Commission'). This Direction must be considered in the context of the objectives of the Commission, in particular the duty to provide a timely and effective dispute resolution service in relation to workers' entitlements under the workers compensation legislation.

INFORMATION EXCHANGE BETWEEN PARTIES

Section 290 of the *Workplace Injury Management and Workers Compensation Act 1998* ('the Act') provides as follows:

290 Information exchange between parties

- (1) When a dispute is referred for determination by the Commission, each party to the dispute must provide to the other party and to the Registrar, as and

when required to do so by the Rules, such information and documents as the Rules require.

- (2) A party to a dispute who fails without reasonable excuse to comply with a requirement of this section is guilty of an offence.
- (3) Any document or information that a party to a dispute has failed to provide in contravention of this section cannot be admitted on behalf of the party in proceedings on the dispute before the Commission.
- (4) Subsections (2) and (3) do not apply if the party is a worker unless it is established that the worker was represented by a legal practitioner or agent (as defined in section 131) at the relevant time.
- (5) The regulations may provide for exceptions to subsection (3). In particular, the regulations may authorize the Commission to permit the admission in proceedings before the Commission in specified circumstances of a document or information that would otherwise be not admissible under that subsection.
- (6) If the Registrar is satisfied that an applicant has failed without reasonable excuse to comply with a requirement of this section, the Registrar may do any one or more of the following:
 - (a) refer the matter to the Authority,
 - (b) note the matter in a certificate issued by the Registrar in respect of the dispute (together with details of the documents or information to which the failure relates),
 - (c) order that a specified amount or proportion of the costs that would otherwise be recoverable by the party in connection with the referral of the matter to the Commission are not recoverable.

Rules 38, 39, 40, 41, 42, 43(7) and 44 of the *Workers Compensation Commission Rules 2003* ('the Rules') provide as follows:

38 Material to be lodged with application

- (1) For the purposes of section 290 of the 1998 Act, the applicant must lodge and serve with the application to resolve a dispute all information and documents on which the applicant proposes to rely and which are in the possession or control of the applicant at that time.
- (2) Subject to subrules (3) - (5), an applicant may not in proceedings introduce evidence that has not been lodged with the application to resolve a dispute, reply or response, or as required by rule 44, in the proceedings unless:
 - (a) the applicant has lodged and served with the application for dispute resolution, or, as the case may require, any response, in the proceedings, a statement revealing:
 - (i) the specific nature of the evidence, and
 - (ii) the reliance the applicant intends to place on the evidence, and
 - (iii) the reasons why the evidence is not available at the time of service, and
 - (iv) the time it is expected to be available, and
 - (b) the evidence is served on all other parties, and lodged, as soon as practicable after the evidence becomes available.
- (3) The Commission may, for the avoidance of injustice, allow an applicant to introduce evidence that the applicant would otherwise be prevented from introducing because of the operation of subrule (2).

- (4) Where an applicant wishes to rely on a document produced as required by a direction issued under section 357 of the 1998 Act, and claims that the applicant was:
 - (a) unaware of the relevant information in the document, or
 - (b) unable to obtain possession of the document, at the time the applicant lodged the application to resolve a dispute, or, as the case may require, any response, in the proceedings, the applicant must, as soon as practicable after becoming aware of the information, lodge and serve on all other parties to the proceedings a statement revealing:
 - (c) the specific nature of the information, and
 - (d) the reliance the applicant intends to place on the information.
- (5) Without limiting subrule (3), where an applicant complies with subrule (4) in respect of any information the Commission may allow the applicant to introduce evidence of that information.

39 Reply by respondent

- (1) The respondent in any proceedings must, within 21 days from the date of registration of the application to resolve a dispute in the proceedings, lodge a reply to the application and serve a sealed copy of the reply on the applicant and any other party to the proceedings.
- (2) If the applicant is an employer (but not a self-insurer), the respondent must serve the reply on both the employer and the employer's insurer.
- (3) Without leave of the Commission, the failure of a worker to notify of an injury as required by the Workers Compensation Acts may not be raised as an issue in the reply by the respondent if that issue has not been included in the notice given in accordance with section 74 of the 1998 Act.

40 Material to be lodged by respondent

- (1) For the purposes of section 290 of the 1998 Act, the respondent must lodge and serve with the reply all information and documents on which the respondent proposes to rely which have not been lodged with the application to resolve a dispute in the proceedings and which are in the possession or control of the respondent at that time.
- (2) Subject to subrules (3) – (5), a respondent may not in proceedings introduce evidence that has not been lodged with the application to resolve a dispute, reply or response, or as required by rule 44, in the proceedings unless:
 - (a) the respondent has lodged and served with the reply a statement revealing:
 - (i) the specific nature of the evidence, and
 - (ii) the reliance the respondent intends to place on the evidence, and
 - (iii) the reasons why the evidence is not available at the time of service, and
 - (iv) the time it is expected to be available, and
 - (b) the evidence is served on all other parties and lodged as soon as practicable after the evidence becomes available.
- (3) The Commission may, for the avoidance of injustice, allow a respondent to introduce evidence that the respondent would

otherwise be prevented from introducing because of the operation of subrule (2).

- (4) Where a respondent wishes to rely on a document produced as required by a direction issued under section 357 of the 1998 Act, and claims that the respondent was:
 - (a) unaware of the relevant information in the document, or
 - (b) unable to obtain possession of the document,at the time the respondent lodged the reply in the proceedings, the respondent must, as soon as practicable after becoming aware of the information, lodge and serve on all other parties to the proceedings a statement revealing:
 - (c) the specific nature of the information, and
 - (d) the reliance the respondent intends to place on the information.
- (4) Without limiting subrule (3), where a respondent complies with subrule (4) in respect of any information the Commission may allow the respondent to introduce evidence of that information.

41 Response by applicant

- (1) Where a reply lodged in any proceedings raises issues not raised in the application to resolve a dispute in the proceedings, the applicant may, within 7 days of being served with the reply, lodge with the Commission and serve on the respondent a response limited to those issues.
- (2) Subrule (1) does not extend to allow an applicant to present to the Commission a case different from the case raised by the application for dispute resolution in the proceedings except where, and to the extent that, the Commission is satisfied that the applicant was not aware, when lodging the application to resolve a dispute, of the issues to which the response is limited.

42 Material to be lodged with response

- (1) For the purposes of section 290 of the 1998 Act, the applicant must lodge and serve with any response all information and documents:
 - (a) on which the applicant proposes to rely in relation to the issues to which the response is limited, and
 - (b) which are in the possession or control of the applicant at that time and have not been lodged with the application to resolve a dispute or reply in the proceedings.
- (2) Rule 38(2) – (5) applies in respect of any evidence lodged under this rule.

43 Joining other parties and disputes

- (7) Where the proceedings were commenced by way of application to resolve a dispute, the person joined as a party must lodge with the Commission and serve on the applicant and any other party to the proceedings a reply to the application to resolve a dispute within 14 days of being served with notice under subrule (5) or (6).

44 Material to be lodged by party joined

- (1) This rule applies to proceedings commenced by way of application to resolve a dispute.

- (2) For the purposes of section 290 of the 1998 Act, a party joined in proceedings must lodge and serve with the party's reply all information and documents:
 - (a) on which the party proposes to rely, and
 - (b) which are in the possession or control of the party at that time and have not already been lodged with any other document in the proceedings.
- (3) Subject to subrules (4) – (6), a party joined may not in proceedings introduce evidence that has not been lodged with the application to resolve a dispute, the respondent's reply, any response by the applicant, or the reply by the party joined, in the proceedings unless:
 - (a) the party joined has lodged and served with the party's reply a statement revealing:
 - (i) the specific nature of the evidence, and
 - (ii) the reliance the party joined intends to place on the evidence, and
 - (iii) the reasons why the evidence is not available at the time of service, and
 - (iv) the time it is expected to become available, and
 - (b) the evidence is served on all other parties and lodged as soon as practicable after the evidence becomes available.
- (4) The Commission may, for the avoidance of injustice, allow a party joined to introduce evidence that the party would otherwise be prevented from introducing because of the operation of subrule (3).
- (5) Where a party joined wishes to rely on a document produced as required by a direction issued under section 357 of the 1998 Act, and claims that the party joined was:
 - (a) unaware of the relevant information in the document, or
 - (b) unable to obtain possession of the document, at the time the party joined lodged the reply in the proceedings, the party must, as soon as practicable after becoming aware of the information, lodge and serve on all other parties to the proceedings a statement revealing:
 - (c) the specific nature of the information, and
 - (d) the reliance the party joined intends to place on the information.
- (6) Without limiting subrule (4), where a party joined complies with subrule (5) in respect of any information the Commission may allow the party to introduce evidence of that information.

LATE DOCUMENTS

1. Late Reply

A late reply to an application for dispute resolution is a reply to an application for dispute resolution lodged outside the timeframe for reply under Rule 39 and Rule 43(7).

2. Late Response

A late response to a reply is a response to a reply lodged outside the timeframe for response under Rule 41.

3. Documents Produced under Direction

Produced documents are documents produced to the Commission as required by a direction issued under section 357 of the *Workplace Injury Management and Workers*

Compensation Act 1998. A party may seek to introduce evidence of that information in accordance with Rules 38(4), 40(4), 42(2) and 44(5). In such cases, the filing party must lodge with the Commission a copy of the documents which it proposes to introduce and a statement revealing the specific nature of the information and the reliance the party intends to place on the information.

4. Late Evidence

Late evidence is any other information that a party seeks to admit into proceedings which did not form part of the application, reply, joinder reply or response, or which was not stated in the application, reply, joinder reply or response in accordance with Rules 38(2), 40(2), 42(2) and 44(3). In such cases the filing party must seek leave to allow the evidence to be introduced in accordance with Rules 38(3), 40(3), 42(2) and 44(4).

APPLICATION FOR LEAVE TO LODGE LATE DOCUMENTS

Parties are expected to comply with the timeframe requirements of the Rules. A party wishing to lodge late documents must seek leave of the Commission.

A party seeking leave to admit late documents must make application on the Commission's approved form (Form 2C Application to Admit Late Documents), available on the Commission's website at www.wcc.nsw.gov.au or by contacting the Commission on 1300 368 040. The application must indicate service on the other parties and provide reasons why leave should be granted. If this information is not provided, the application for leave to admit late documents WILL NOT be accepted.

DETERMINATION OF AN APPLICATION FOR LEAVE TO LODGE LATE DOCUMENTS

Applications to admit late documents will be resolved by the Arbitrator in accordance with section 355(1) of the Act.

The Arbitrator will generally deal with the application to admit late documents at the teleconference, held in accordance with *Registrar's Guideline for the Conciliation and Arbitration Process in the Workers Compensation Commission*.

In determining an application for leave to lodge late documents, the Arbitrator will take into consideration:

- the submissions of the parties, including, if any, oral or written objections to the grant of leave,
- the effect, if any, on the timely resolution of the dispute,
- the extent of the prejudice to the other parties, if any, that would result from granting leave,
- the requirements of the Act and the Rules, and
- the objectives of the Commission.

Issued on 10 December 2003 pursuant to Rule 89 of the *Workers Compensation Commission Rules 2003*.

The Hon Justice Terry Sheahan AO
President

Contact the Commission

For information or assistance, please contact the Workers Compensation Commission between 8.30 am and 5.00 pm Monday to Friday :

By telephone: 1 300 368 040

TTY (for people with hearing impairments): (02) 9261 3334

By facsimile: 1 300 368 018

In person at: The Registry, Level 4, 1 Oxford Street, Darlinghurst
NSW 2010

Postal Address: PO Box 594 Darlinghurst NSW 1300

Document Exchange: DX 11524 Sydney Downtown

Email: registry@wcc.nsw.gov.au

Further information and forms: www.wcc.nsw.gov.au